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Mohd Yasser bin Shaik Mahmad v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — APPEAL NO P-05(M)-337–12 OF 2015
ZAWAWI SALLEH, ABANG ISKANDAR AND ABDUL RAHMAN SEBLI JJCA
28 FEBRUARY 2017

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Criminal Law — Appeal — Appeal against conviction and sentence — Accused charged with offence of murder punishable under s 302 of the Penal Code — Trial court convicted accused and sentenced accused to death — Whether trial judge failed to appreciate accused's defence — Whether trial judge failed to appreciate provocation including cumulative provocation — Whether injury inflicted by accused sufficient in ordinary course of nature to cause death — Whether sentence appropriate — Penal Code ss 300, 302 & 304(a)

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The accused was charged with the offence of murder against one Zaini bin Ahmad ('the deceased'). The prosecution's case was that the accused had committed the offence by hitting the deceased's head five times with a helmet. In defence, the accused did not deny that he had hit the deceased at the internet shop as he felt angry with the deceased for not responding to him when he asked him about the 'syabu', nonetheless, the accused denied having any intention to kill the deceased. At the end of the trial, the High Court found the accused guilty of the offence and proceeded to sentence him to death. Aggrieved by the decision, the accused filed the present appeal. The issues raised by the appellant were: (a) with regards to the failure of the learned trial judge to appreciate the defence; (b) failure of the learned trial judge to appreciate provocation, including cumulative provocation; and (c) there was no medical evidence to show that the injury that was inflicted by the accused was sufficient in the ordinary course of nature to cause death.

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Held, allowing the appeal; setting aside the conviction and sentence for the offence of murder; entering a conviction for culpable homicide not amounting to murder against the accused; and sentencing the accused to 20 years imprisonment with effect from the date of arrest:

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(1) In the context of the factual circumstances in this instant appeal, it was clear that the appellant had intended the injuries which were inflicted by him on the deceased's head which, objectively, was a critical part of a human anatomy, with a helmet (see para 21).

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(2) Based on statement of the pathologist ('SP16'), the injury suffered by the deceased was not ipso facto fatal. Thus, it could not be said that the injury

could be categorised as one which was 'sufficient in the ordinary course of nature to cause death' within the contemplation of limb (c) of s 300 of the Penal Code ('the Code'). The evidence of SP16 did not come out clearly to indicate whether the injury suffered by the deceased was either one that was 'most probably to cause death' or that it was 'only likely to cause death'. A doubt was created and any such doubt created must be resolved in favor of the accused person. That much, the law is trite. Based on the findings, the conviction entered against the accused under s 302 of the Code could not stand (see paras 28 & 30).

(3) In the circumstances of the case, there was no need for the court to consider the defence of provocation for two reasons. Firstly, in the charge of murder, cumulative provocation was not a defence which was known in criminal law. Secondly, as the charge had been reduced to culpable homicide not amounting to murder, such a defence of grave and sudden provocation was not defence that was at the disposal of the accused (see para 35).

(4) The sentence was appropriate in the circumstances bearing in mind the public interest element involved. A life had been needlessly lost in the present case and there were really no extenuating circumstances which could be favourably taken in favour of the accused person, apart from the fact that he was a first offender. In a case of culpable homicide not amounting to murder, that factor would not count for much as a mitigating factor (see para 38).

[Bahasa Malaysia summary

Tertuduh dituduh dengan kesalahan membunuh terhadap seorang yang bernama Zaini bin Ahmad ('si mati'). Kes pihak pendakwaan adalah bahawa tertuduh telah melakukan kesalahan dengan memukul kepala si mati lima kali dengan topi keledar. Dalam pembelaan, tertuduh tidak menafikan bahawa dia telah memukul si mati di kedai internet kerana dia berasa marah dengan si mati kerana tidak respons kepadanya apabila dia bertanya kepada si mati mengenai 'syabu', walau bagaimanapun, tertuduh menfaikan mempunyai niat untuk membunuh si mati. Di akhir perbicaraan, Mahkamah Tinggi mendapati tertuduh bersalah terhadap kesalahan dan meneruskan untuk menjatuhkan hukuman mati ke atasnya. Tidaak puas hati dengan keputusan tersebut, tertuduh memfailkan rayuan ini. Isu-isu yang dibangkitan oleh perayu adalah: (a) berkaitan kegagalan hakim perbicaraan yang bijaksana untuk menilai pembelaan; (b) kegagalan hakim perbicaraan yang bijaksana untuk menilai provokasi, termasuk provokasi kumulatif; dan (c) tidak terdapat keterangan perubatan untuk menunjukkan bahawa kecederaan yang disebabkan oleh tertuduh adalah memadai dalam perjalanan biasa menyebabkan kematian.

Diputuskan, membenarkan rayuan; mengetepikan sabitan dan hukuman bagi kesalahan membunuh; memasukkan sabitan untuk homisid salah yang tidak

menjumlahkan kepada pembunuhan terhadap tertuduh; dan menjatuhkan hukuman 20 tahun penjara ke atas tertuduh dengan serta merta dari tarikh ditangkap:

(1) Dalam konteks keadaan fakta dalam rayuan ini, ia adalah jelas bahawa perayu telah meniatkan kecederaan yang dilakukan olehnya ke atas kepada si mati yang mana, secara objektif, adalah bahagian kritikal anatomi manusia, dengan topi keledar (lihat perenggan 21).

(2) Berdasarkan atas pernyataan patologi ('SP16'), kecederaan yang dialami oleh si mati bukan serius ipso facto. Oleh itu, ia tidak dapat dikatakan bahawa kecederaan boleh dikategorikan sebagai satu yang mana adalah 'sufficient in the ordinary course of nature to cause death' dalam tekaan peruntukan (c) s 300 Kanun Keseksaan ('Kanun'). Keterangan SP16 tidak jelas untuk menunjukkan sama ada kecederaan yang dialami oleh si mati sama ada satu 'most probably to cause death' atau adalah 'only likely to cause death'. Keraguan telah terbentuk dan apa-apa keraguan yang terbentuk sedemikian mesti diselesaikan dengan memihak tertuduh. Setakat itu, undang-undang adalah nyata. Berdasarkan dapatan, sabitan yang dimasukkan terhadap tertuduh di bawah s 302 Kanun tidak boleh dipertahankan (lihat perenggan 28 & 30).

(3) Dalam keadaan kes, tidak perlu untuk mahkamah mempertimbangkan pembelaan provokasi bagi dua alasan. Pertama, dalam tuduhan membunuh, provokasi kumulatif bukan pembelaan yang diketahui dalam undang-undang jenayah. Kedua, memandangkan tuduhan telah dikurangkan kepada homisid salah yang tidak menjumlahkan kepada pembunuhan, pembelaan bangkitan marah besar dan mengejut sedemikian bukan pembelaan yang boleh digunakan bila-bila oleh tertuduh (lihat perenggan 35).

(4) Hukuman adalah wajar dalam keadaan mengambil kira unsur kepentingan awam terlibat. Nyawa telah hilang secara sia-sia dalam kes ini dan tidak terdapat hal keadaan peringanan yang mana boleh diterima bagi memihak tertuduh, selain daripada fakta bahawa dia adalah pesalah pertama. Dalam kes homisid salah yang tidak menjumlahkan kepada pembunuhan, faktor tersebut tidak akan dikira sebagai faktor pengurangan (lihat perenggan 38).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 42–83.

Cases referred to

Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)

Faquira v State of UP AIR 1976 SC 915, SC (refd)

KM Nanavati v State of Maharashtra 1962 AIR 605, SC (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] 1 CLJ 143, SC (refd)
PP v Surbir Gole [2017] 1 MLJ 549, FC (refd)
Sia Soon Suan v PP [1966] 1 MLJ 116, FC (folld)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (folld)

Legislation referred to

Penal Code ss 300, Exception 1, 300(c), 302, 304(a)
Indian Penal Code [IND] s 300

Appeal from: Criminal Trial No 45B-18–06 of 2014 (High Court, Penang)

Ranjit Singh Dhillon (J Kaur, Ranjit & Assoc) for the appellant.
Jasmee Hameeza bt Jaafar (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

THE CHARGE

> Bahawa kamu pada 26/01/2013 jam lebih kurang 3.00 pagi hingga 4.00 pagi di No 1-01-43A Ideal Avenue, Medan Kampong Relau 1, 11900 Bayan Lepas di dalam daerah Barat Daya, di dalam negeri Pulau Pinang telah melakukan bunuh dengan menyebabkan kematian ke atas Zaini bin Ahmad (L) Kp 760613-07-5133, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

BRIEF FACTS OF THE CASE

[1] On the day as mentioned in the charge, Mohd Yasser bin Shaik Mahmad ('the accused'), went to the stated shop with his two friends namely, VT Sudesh Kumar a/l Veerayah ('SP8') and one Vickneswaran.

[2] When the accused entered into the shop, Zaini bin Ahmad ('the deceased') was surfing the internet at computer No 9. The accused sat beside the deceased and talked to the deceased but the deceased did not respond to him. Suddenly, the accused stood up and hit the deceased's head five times with a helmet before leaving the said shop.

[3] After being hit, the deceased remained silent with his head resting on-top of the computer desk. After a while, he stood up and proceeded slowly to the toilet in the shop.

[4] The deceased then went back to the shop's counter and sat beside Tan Kun Seng ('SP13'). SP13 told the deceased that his eye looked red. SP13

advised the deceased to go to the hospital as the deceased walked out from the shop.

[5] On the same day, Amir Hasyim Ibrahim ('SP3'), received a phone call from a man called 'Man' informing him that there was a man who had passed out near the B-Suite Hotel, Bukit Jambul, Pulau Pinang. SP3 went to the place and there he found the deceased lying unconscious at the back seat of a van which was about 20 meter from the internet shop. He could see an injury on the deceased's head with blood stain on his shirt. He also saw that the deceased had wounds at his mouth and nose and that his eyes were swollen.

[6] The deceased was later rushed to the Penang Hospital. At the hospital, Dr Nasir bin Abdul Wahab ('SP24') examined the deceased and found that the deceased had suffered severe injury on his head. The deceased succumbed to his injury on 28 January 2013 at 10.26am.

[7] The post-mortem report prepared by Dato' Dr Bhupinder Singh ('SP16') showed that the cause of the deceased's death was 'extradural hemorrhage due to blunt trauma to the head'.

[8] Premised on the above factual circumstances, the accused was charged under s 302 of the Penal Code at the High Court in Penang for causing death to the deceased without lawful excuse. At the end of prosecution case, the court found that the prosecution had successfully established a prima facie case as per the murder charge against the accused and had ordered him to enter on his defence.

[9] In his defence, the accused said that, a night before the incident, the deceased asked the accused to bring him some 'syabu' and they agreed to meet at Taman Bendera. When the accused arrived at Taman Bendera, the deceased said he did not bring any money with him and asked the accused to go with him to Petronas Relau to take the money. Instead of going to Petronas Relau, they went to Paya Terubung where the deceased had left him there. The deceased had to walk back for about two to three kilometers to Taman Bendera. The deceased had also absconded with the 'syabu' worth RM300 without making any payment to the accused. The accused did not deny that he had hit the deceased at the internet shop as he felt angry with the deceased for not responding to him when he asked him about the 'syabu'. However, the accused denied having any intention to kill the deceased.

[10] At the end of the case, the High Court judge found that the accused had failed to cast a reasonable doubt against the prosecution case and had found him guilty for the murder of the deceased. He proceeded to sentence him to death as provided for by the law. Aggrieved by the decision, the accused had

A then appealed against the decision to this court.

THE APPEAL

B **[11]** We heard the appeal on 30 November 2016. Before us, counsel for the accused raised three main issues namely:

(a) failure of learned trial judge to appreciate the defence;

(b) failure of learned trial judge to appreciate provocation, including cumulative provocation; and

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(c) that there was no medical evidence to show that the injury that was inflicted by the accused was sufficient in the ordinary course of nature to cause death.

D OUR FINDINGS

[12] Having considered the submissions by both learned counsel and the learned deputy public prosecutor ('DPP'), we allowed this appeal in part. We set aside the conviction and the death sentence for the offence of murder. In its E place, we had entered a conviction for culpable homicide not amounting to murder under s 304(a) of the Penal Code and sentenced him to 20 years imprisonment with effect from the date of his arrest ie 28 January 2013. We now proffer our reasons for having decided the way we did.

F **[13]** We will deal first with the issue (c). We start with s 300(c) of the Penal Code. It reads:

> ... if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to G cause death ...

[14] From a bare reading of s 300(c) of the Penal Code, it is clear that murder may also be committed if the accused intentionally causes an injury to a person which injury, in the ordinary course of nature, is sufficient to cause death. H Under that limb (c) to s 300 of the Penal Code, an intention to kill on the part of an accused person is not a pre-requisite which the prosecution would otherwise have to prove in order to secure a conviction for a murder charge.

I **[15]** Therefore, to sustain a charge of murder under limb (c) to s 300 of the Penal Code, the prosecution must lead evidence from a medical doctor to testify in court to the effect that the injury sustained by the deceased and intentionally caused by the accused, was sufficient in the ordinary course of nature to cause death to the victim. That test is an objective test.

[16] Reverting to our instant appeal, there was the evidence from the prosecution witness who had testified to the effect that the injury sustained by the deceased that was attributable to the accused. But the critical question that needed to be answered, and answered in the clearest of terms, was whether the injury that was inflicted by the accused and suffered by the deceased was sufficient in the ordinary course of nature to cause death.

[17] In this case, the deceased did not die immediately after being admitted into hospital. In fact, he died two days later.

[18] Limb (c) under s 300 of the Penal Code is in pari materia with the third limb of the Indian Penal Code. It has been observed by Ratanlal and Dhirajlal, in *The Law of Crime*, that in order to establish a case against the accused under this particular limb, the prosecution had to prove, first, that the accused person had intentionally caused bodily injury or injuries onto the deceased's person; and secondly, that the injury so inflicted on the deceased was sufficient in the ordinary course of nature to cause death (refer to the case of *Faquira v State of UP* AIR 1976 SC 915). The same learned authors further observed as follows:

> From the fact that the injury caused is sufficient in the course of nature to cause death, it does not conclusively follow that the offender intended to cause an injury of that nature. The one does not conclusively prove the other.

[19] The authors concluded, on the true interpretation of that cl 3 to s 300 of the Penal Code, as follows:

> To attract the provisions of clause thirdly of s 300, IPC. the prosecution should prove that he injuries on the person of the deceased were caused with an intention to inflict those injuries and none of the injuries was caused unintentionally. It should also be further proved that the injuries caused to the deceased were sufficient in the ordinary course of nature to cause his death. (See, the case of *Shiv & Ors v State of Madya Pradesh* [1988] 3 Crimes 8).

[20] With respect, we agree with the learned authors, on the true import of the limb (c) to our s 300 of the Penal Code. It has given great clarity as to the required legal elements that the prosecution would need to establish in order to secure a conviction for murder against the accused person. We would wish to add that while the first part of the limb (c) to s 300 of the Penal Code could be proven by evidence, either direct or circumstantial, from witnesses of fact called by the prosecution, however the second part of the same limb (c) must inevitably be established, as a matter of expert medical opinion, that such injury that was intentionally inflicted was sufficient in the ordinary course of nature to cause death to the deceased. In normal circumstances, clear testimony to that effect, from the pathologist who has performed the post-mortem or

autopsy on the deceased body, would suffice to establish that crucial factual circumstance and legal element.

[21] The evidence led in this instant appeal had shown the accused had hit the deceased person on his head several times with a helmet on that fateful day. The criminal law generally presumes that every man intends the consequences of his deliberate acts, overt or opaque, including omissions, unless he could show that those acts or omissions have been occasioned by him, either accidentally or negligently, or when those acts or omissions were done by him when he was not in control of his mind, as those latter circumstances would either totally or partially negative criminal intention (the mens rea or guilty mind) on his part. Or that there was a material intervening act subsequent to his impugned acts or omissions. In the absence of those circumstances, he must be deemed to have intended the consequences of his acts or omissions. In the context of the factual circumstances in this instant appeal, it was clear to us that the appellant had intended the injuries which were inflicted by him on the deceased's head which, objectively, is a critical part of a human anatomy, with a helmet.

[22] We now turn to consider the evidence adduced by the prosecution that would evince the nature of the injury suffered by the deceased. The crucial evidence is the testimony of the pathologist Dr Bhupinder Singh ('SP16'). He was the consultant forensic who performed the post mortem on the deceased. We would go straight to that part of his evidence which was concerned with this crucial aspect of the prosecution case. For that purpose, we would advert to p 178 of the record of appeal, Vol 2 and this was what we had found:

> TPR: Whether the injury suffered is ordinary course in nature?

[23] Viewing in context, we were of the opinion that the question ought to read as follow:

> TPR: Whether the injury is sufficient in ordinary course of nature to cause death?

[24] To the question posed by the learned DPP, SP16 had answered,

> I think I have answered the question just now. The same thing.

[25] So, we had to go back to p 177 of the record of appeal to see what SP16 had earlier alluded to the court as to his answer as to the nature of the injury. The question which the TPR had asked him was: 'Whether the injury fatal in nature?'. This was what the SP16 had testified in court, in response to that question:

> I think it is very difficult in nature because if he has been found early brought to the hospital and he could survive then we can say it's not fatal. In this particular case he

was brought in late and when he was brought in the ... hematoma already develops. The swelling to the brain was there. There were already concussions of the brain due to the pressure of the cloth. In this particular case, he is in very critical conditions. It's become fatal in this case.

[26] The learned DPP submitted before us that this part of the pathologist's ('SP16') evidence was sufficient in order to satisfy the requirement set out in limb (c) to s 300 of the Penal Code upon which the prosecution was relying on to frame the murder charge against the accused. The learned DPP was candid enough to concede during submissions before us that this was the only evidence that was directed to address limb (c) to s 300 from SP16.

[27] With respect, we were of the view that this evidence by SP16 as reproduced in the above paragraph in this judgment was not sufficient to fulfill what was required of the prosecution in order to establish the crucial element in limb (c) upon which the prosecution had professed to premise the murder charge against the accused. What the said limb (c) required, with respect, from the prosecution would be for it to lead objective evidence coming from a witness with the necessary expertise in medical science to testify in court that the injury that was intentionally inflicted on the deceased by the accused is, in his opinion, sufficient in the ordinary course of nature to cause death. In this instant appeal, SP16 did say that the injury caused the death of the deceased because apparently, medical treatment was not rendered quickly enough on the deceased. But the SP16 did not say whether, in his opinion, the injury that was sustained by the deceased was in the nature of an injury which 'is sufficient in the ordinary course of nature to cause death'. To be fair to the DPP who did the prosecution in the High Court, he did try to ask that question of SP16 as illustrated in para [23] of this judgment, but SP16 had responded by saying that he thought that he had answered that question already. To our mind, the learned DPP ought to have pursued that line of questioning because the answer given by SP16 to the previous question immediately preceding that question did not have the desired effect of addressing what was required by the phrase 'is sufficient in the ordinary course of business to cause death'. As the evidence of the prosecution stood at the end of its case at the High Court trial, the phrase 'is sufficient in the ordinary course of nature to cause death' in limb (c) to s 300 of the Penal Code, had remained not proved. To our mind, the absence of such positive statement of opinion emanating from such an expert medical witness ('SP16') was fatal to the charge for murder that was premised upon limb (c) to s 300 of the Penal Code.

[28] To reiterate, from the answer that was given by SP16, the pathologist, the injury suffered by the deceased was not ipso facto fatal. If immediate medical treatment or attention was rendered to the deceased, he could have been saved. That was the tenor of his evidence in court. It was clear to our mind

A that in light of such testimony from SP16, it could not be said that the injury suffered by the deceased could be categorised as one which was 'sufficient in the ordinary course of nature to cause death' within the contemplation of limb (c) of s 300 of the Penal Code. Death was not an imminent natural consequence of the injury inflicted by the accused although the infliction of the injury was B intentional on the part of the accused. Though death may have been a *likely* result, it was not *most probably* to happen in itself if medical attention was promptly rendered. It depends on the severity of the injury or injuries suffered by the deceased as a result of the intended injury or injuries. Thus, death caused by an injury intentionally inflicted by a single blow, may properly be used to C found a murder charge, depending on the nature of the injury as testified to by a medical expert (pathologist) that was inflicted in the context of limb (c) of s 300 of the Penal Code. We would refer to the decision of the then Federal Court case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 D where learned Justice Raja Azlan Shah FCJ (as His Highness then was) had occasion to state the difference that exists between murder and culpable homicide not amounting to murder in the following manner. If the impugned injury inflicted will in *most probability* cause death, then it is murder. If however, an act that is *only likely* to cause death, then it is only tantamount to E culpable homicide not amounting to murder. Now, that to our mind, neatly encapsulates the critically fine but significant distinction, that demarcates criminal misconducts as to what would, in law, amount to murder and culpable homicide not amounting to murder. It is a matter of life and death. In that regard, we could do no better than to adopt the said approach, so succinctly F expressed by learned Justice Raja Azlan Shah FJ (as His Highness then was) in the *Tham Kai Yau*'s case. The evidence emanating from SP16 (the pathologist) did not come out clearly to indicate whether the injury suffered by the deceased was either one that was *most probably* to cause death or that it was *only likely* to cause death. To our minds, a doubt was created and any such doubt created G must be resolved in favor of the accused person. That much, the law is trite.

[29] So to recap, it was our considered view that there was insufficient evidence coming from the relevant prosecution witnesses to state with clarity as to whether the injuries inflicted by the accused were 'sufficient in the ordinary H course of nature to cause the death' of the deceased. The role of a criminal court is circumscribed. It has to act on the admissible evidence that was led within its four walls. A judge may well have his or her own personal view about the case that he or she is adjudicating, but in the final analysis, the ultimate decision of the court must be driven entirely by the force of the evidence before it, one way I or another. Justice Ong Hock Thye FJ captured the very essence of how a judge should decide a case before him, in the Federal Court case of *Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116, where the learned judge had occasion to say the following:

> ... the requirements of strict proof in a criminal case cannot be relaxed to bridge any

material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in his own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else ...

[30] Premised on the above findings by us, the conviction entered against the accused under s 302 of the Penal Code could not, with respect, stand. The lack of medical evidence that would establish the critical element of s 300(c) of the Penal Code had put paid to the prosecution case for murder. In the result, the appeal ought to be allowed in part and that a conviction for culpable homicide not amounting to murder under s 304(a) of the Penal Code be entered against the accused person.

[31] In light of our findings above, it had become unnecessary for us to consider the other two grounds (a) and (b) as raised by learned counsel on behalf of the accused person. To our minds, those grounds would only be relevant for our consideration if the charge for murder had been established on a prima facie level at the end of the prosecution case.

[32] But for reason of completeness, in particular, we would address the defence of provocation. To our minds, it would only be available in a charge for murder. The wordings under the Penal Code to describe the provocation are 'grave and sudden'. In fact, it has to be so grave and sudden that there was no time to reflect, before an accused person commits the impugned conduct. In the words expressly employed in Exception 1 to s 300 of the Penal Code, 'Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, ...'. The legal test that needed to be satisfied by an accused person desirous of benefitting from this defence of provocation has been laid down by the Supreme Court of India in the case of *KM Nanavati v State of Maharashtra* 1962 AIR 605 to be as follows:

The test of 'grave and sudden provocation' is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self control.

[33] This test had been imported into our very own local criminal jurisprudence as the correct statement of the law by our apex court in the case of *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ 143 which was subsequently referred to with approval by the Federal Court in the case of *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281. Indeed, the recent decision of our apex court in the case of *Public Prosecutor v Surbir Gole* [2017] 1 MLJ 549 via the speech by learned Justice Zaharah Ibrahim FCJ had the effect of reiterating the principle so entrenched in our criminal jurisprudence that for a defence of provocation to succeed in a murder charge, it is incumbent on the accused person to satisfy the

court that the alleged provocation coming from the deceased person was grave, as well as it was sudden.

[34] Having considered the state of the law on provocation that is capable of reducing a charge for murder to one for culpable homicide not amounting to murder, as falling within Exception 1 to s 300 of the Penal Code, Her Ladyship had concluded in para 35 of her grounds of judgment on behalf of the apex court, as follows:

> We believe that *Che Omar*'s case has made the legal position clear with regard to cumulative provocation of the nature described in para 34 above. We ought to be reminded that the defence of 'cumulative provocation' does not exist in our criminal law, and therefore we are not persuaded that it is a permissible defence to s 300 of the Penal Code. Only the defence of grave and sudden provocation is specifically provided for in Exception 1 to s 300 in the Penal Code. We are not inclined to agree to any departure from the established law.

[35] As such, nothing short of grave and sudden provocation would suffice. But in the circumstances of this case, there was no need for this court to consider this defence of provocation for two reasons. First, in a charge for murder, cumulative provocation, was not a defence which was known in criminal law. The fact that the defence of provocation was 'cumulative', it presupposes that it was a total sum of a series of incidents which the accused person had alleged to have a provocative effect on him. In other words, they were not sudden and grave in effect if taken singularly as an act. Secondly, as the charge had been reduced to culpable homicide not amounting to murder by us, such a defence of grave and sudden provocation is not defence that is at the disposal of the accused person.

[36] From our perusal of the evidence, it is clear that the accused had caused the death of the deceased but the same time the body of evidence that was led in court did not evince that it was an act that could amount to murder within contemplation of limb (c) of s 300 of the Penal Code. In fact, it was submitted before us during oral submissions by learned counsel for the accused that in view of the circumstances of this case, the accused ought to be convicted for culpable homicide not amounting to murder. In light of the state of the evidence, in particular in relation to the medical evidence of SP16, we had, with respect, agreed with him.

[37] Based on the above reasons, we had unanimously found that the medical evidence was not sufficiently clear to prove that murder had been established beyond reasonable doubt. We were of the opinion that this had been a fit and proper case to reduce the murder charge against the accused to one of culpable homicide not amounting to murder under s 304(a) of the Penal Code. We, therefore, had set aside the conviction entered and the death

sentence imposed by the learned High Court judge under s 302 of the Penal Code, against the accused person.

[38] Having heard the submissions on mitigation by both parties, we had imposed a sentence of 20 years' imprisonment from the date of arrest. The sentence was, to our minds, appropriate in the circumstances bearing in mind the public interest element involved. A life had been needlessly lost in this case and there were really no extenuating circumstances which could be favourably taken in favour of the accused person, apart from the fact that he was a first offender. In a case of culpable homicide not amounting to murder, that factor would not count for much as a mitigating factor. Order accordingly.

Appeal allowed; conviction and sentence for offence of murder set aside; conviction for culpable homicide not amounting to murder entered against accused; accused sentenced to 20 years imprisonment with effect from date of arrest.

Reported by Dzulqarnain Ab Fatar